## United States Court of Appeals for the Second Circuit



### APPELLANT'S APPENDIX

## 76-1602

### United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1602

UNITED STATES OF AMERICA.

Appellee,

JERRY ROSENBLUM,

Appellant.

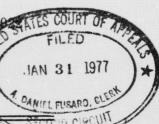
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

### APPENDIX IN BEHALF OF APPELLANT JERRY ROSENBLUM

HOFFMAN POLLOK MASS & GASTHALTER
Attorneys for Appellant,
Jerry Rosenblum
477 Madison Avenue

New York, New York 100

(212) 688-7788





PAGINATION AS IN ORIGINAL COPY

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DATE	<b>1</b>			PAOCEEDINGS	Asset Asset	
5/15/75 Befo	ore COSTANT	NO,J I	ndictmer	t filed -	Bench warran	orderes:
5/15/75 Before COSTANTINO, J Indictment filed - Bench warrant orders 5/15/75 Bench warrants issued						
5-17-75 Before CATOGGIO, Magistrate - case called - defr MAYORGA						
pro	produced in court on a bench warrant - deft arraigned and enters					
	a plea of not guilty = deft advised of right to retain coursele					
cas	case set down for June 17, 1975 before Judge Nesher for planding					
mot	motions and to set date for trial - bail \$25,000 PRB signed by					
deft and wife Lisette - father & mother of deft to appear before the Magistrate to pledge home.						

# 75CR 404

94			4	<b>共争制</b> 30	
TANKS.	PROCEEDINGS				
-					
-	June 17, 1975 at 10:00 AM. before Judge Meaher	AF De	40.	100	
5-12-2	dotice of Motion filed, ret. June 17, 1975; for Bill	19 A 6 19		7 ( year )	
	Inspection etc.		100		
18/75	Before NEAHER, J Case called - Defts and counsel presen		,	A CONTRACT OF	
	motion for discovery and inspeciton granted as indicat	100	140 mm/	Market 1 and St	
•	deft Rosenblum's motion for bill of particulars grants	d and	dens	ad as	
b.	indicated on the record-case adjd to 12/8/75 at 10:00	N. N.	02 5		X Price of
-31-75	Govts Notice of Readiness for Trial filed	230	1000	-	-
10-31-	75 Govts responses filed to omnibus motion of deft Jerr	ROBE	hblo		
11-11	75 Bovts response filed to omnibus motion of deft Mayo	rga.			
11-11-	5 Govts Notice of Readiness for Trial filed.		. 12	306	
-8-75	Before NEAHER, J - case called - defts & counsels Mur	hry ar	d Ca	sahal	CAT'S
et .	present - trial ordered and Begun - Jurors selected	end ev	orn	Moor	214
	opens - deft Rosenblum opens - deft Mayorga waives ope				
	trial contd to 12-9-75.				1
9-75	Before NEAHER, J - case called - defts & attys prese	at -			
487-17	resumed - defts motion to dismiss count 8 withdrawn				
	to Dec. 10, 1975 at 10:00 am.	7 38	T.		
	The same of the sa	L'a Ez	4		
10/75		100			
14-7 H	before NEAHER, J Case called - defts and counsel pres	ent		Tak.	
111775		4 C 4 5	4		
13	trial contd to 12/15/75 at 10:00 A.M.	1		-	
2/15/7	Before NEAHER, J Case called - defts and counsel pres	- day	200	A Cabo	
1	govt rests- both defts move for judgment of acquittal				
-	trial cont to 12/16/75 at 10:00 A.M.	no - +		A STATE OF THE STA	
12-16-	A S I t of A month of a dist	led at	to	Roses	
3 -	decision reserved as to Mayarga - court charges jury	- 81	erna	Les	
6.4		4 4 4 1	1/4	1 10000	
***	discharged - trial contd to 12-17-75 at 9:00 am.				
12-17	-75 Before NEAHER, J - case called - defts present with	accya	0 30	181	
100	resumed -Jury continues deliberations - trial contd to	112-1	8-13	1	1
1	at 9:30 am.	1	1 3		在内
213-17	-75 By NEAHER, J - Order of sustenance filed	100	16.4	1	1
12-1	75 Before NEAHER, J - case called - defts present with	accy	1	3. 35	1
1 - L	trial contd to Dec. 22, 1975 for further deliberation	85 T	BELA	peces	Sec
Pa	and special verdict forms ordered sealed	· ·		The state of	A. W.
2/23/7	- de deservier e o 10 Taile	and	16 2	Led	1
21	· · · · · · · · · · · · · · · · · · ·	¥.			15.00
-	72-14456	1000			10

CRIMINAL DOCKET

DATE	PROCESSIONES 1
12/22/75	Before NEAHER, J Case called- deft present with counse trail and the
2-1113	jury resumes deliberations-jury returns and renders a vertice of not
•	guilty as to counts 4,5, and 8 and failed to agree on counts 1.2.
	and 7 as to deft Rosenblum-judge re-charges jury jury dismissed courts
**	declares a mistrial-deft Mayorga's motion for judgment of acquired
2	granted bail exonerated-deft Rosenblum contd on bail-deft water
. 7	to trial within 90 days-case adjd to 1/26/75 at 10:00 A.M. for states
•	report as to deft Rosenblum
12/22/75	By NEAHER, J Judgment: of acquittal filed (MAYORGA)
12/22/75	
1/19/76	Stenographers Transcript dated 12/22/75 filed
1-20-76	the state of the s
1-20-76	Docket entries and duplicate of Notice mailed to the Court of
6	Appeals.
1/26/76	Before NEAHER, J case called - deft Rosenblum and counsel present
in .	adjd to 3/8/76 at 10:00 A.M. for trial
2/9/76	Record on appeal certified and mailed to court of appeals
2/11/75	Acknowledgment received from court of appeals for receipt of records
3/8/76	Before NEAHER, J Case called - deftand counsel present - case add to
<b>F</b>	6/21/76 for trial(ROSENBLUM)
3-11-76	
7-13-	
6.60	acknowledgment mailed to Clerk.
率级 10/19/7	6 Notice of motion pursuant to Rule 12 to dismiss Count 1 of the
	Indictment filed returnable 10/26/76 and forwarded to chambers (Rock)
10-26-76	Before Neaher, J.= Case Called. Deft & Counsel Present. Deft
F	motion to strike count 1 of the indictment & to suppress statement
	Argued. Suppression hearing continued to 10-27-76 at 10:00 A.M. Trial c
23890	ordered and begun. Jurors were selected & sworn. Trial continued
	to 10-27-76 at 10:00 A.M.
10-27	-76 Before Neaher, J - case called - deft & atty present -
· · · · · · · · · · · · · · · · · · ·	suppression hearing contd - defts motion to suppress statements
*	made by him at the time of arrest - denied - defts motion to
# ·	suppress conspiracy count - denied - suppression hearing
	concluded - trial resumed - Govt opens - deft opens - trial contd
A Company	to Oct. 28, 1976
	The state of the s
W. St.	A Company of the Comp

BATE	
28-	76 Before Neaher, J Case Called. Deft & Councel Present. Trialingsumes
	Trial continued to 10-29-76 at 10:15 A.M. (JERRY BOSENSTANO)
29-	76 Before Neaher, J Case Called. Deft. & Counsel present
6,	Trial resumed. trial continued to 11-1-76 at 10:15 A.M. (JERRY CORNELLE)
+1-	76 Before Neaher, J Case Called. Deft. & Counsel present. Tries
137	Trial continued to 11-2-76 at 10:00 A.M. (JERRY ROSENBLUM)
1-2-	76 Before Neaher, J Case Called. Deft. & counsel present. Trial resumed
7	Trial continued to 11-3-76 at 10:00 A.M. (JERRY ROSENBLUM)
1-4	-76 Govts Requests to Charge filed (recvd from Chambers and returned
7.	as directed (Rosenblum)
1-3	-76 Before Neaher, J - case called - deft & counsel Arthur Mass
1	present - trial resumed - Govts summation - deft Rosenblum a
-	summation - deft moves for mistrial - denied - alt. Jurar
1	discharged - Jury retires to deliberate - trial contd to 11-4-15
14/	76 Before NEAHER, J Case called. Deft & Counsel present. Triel regused.
74	resumes deliberation. Trial continued to 11/5/76 at 10:00 a.m. (805 MBLUM)
141	76 By NEAHER, JOrder of sustenance signed and filed. (HERRY ROSENSLED)
6.155	6 Before NEAHER, J Case Called. Deft. & Counsel present.
1.1	Jury returns with guilty verdict as as to count 1. Bail cont me
N.	Case adjd without date for sentence. Trial concluded. (JERRE ROSENBLING
8-	76 7 transcripts filed pages 1 to 1146(dated Oct.26, 27, 28; 29 and 40
*	2, 3, 1976 , respectively)
E-B	76 By Neaher, J - Order of sustenance filed (Lunch)
2.7	6 Stenographers transcript filed dated 11-4-76
2-2	-75 Stenographers transcript filed dated 11-5-76
12	1/76 Before NEAHER, J Case called, Deft &Counsel present Deft
3	sound guilty by jury is sentenced: 4 years imprisonment to run concurrent
1	with the unexpired special parle term previously imposed by Judge Ray 101
300	a special parole term of b years. Execution of sentence stayed pending spoes
W	On motion of AUSA - Goldman counts 2,3,6, and 7 dismissed. Deft advised offis
诗	right to appeal. form A filed. Bail continued pending appeal. (ROSENBLUM)
10	
. /17	17/76 Judgment & Commitment filed. Certified copies to Marshals and probation 190
717	/86 Docket entries and duplicate of Notice of Appeal mailed to the C of A.
T,	(ROSENBLUM).
28-	76 Order filed received from the Court of Appeals that the appeal be cocketed
-	and the record filed on or before January 4, 1977 (JERRY ROSENBLEM)
W	To and the state of the state o

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CRIMINAL DOCKET 75 CR 404 U.S.A. VS JEREY ROSENBLUM AND HENRY MAYORGA

DATE	PROCESSOR AL
12/29/76	Stenographers transcript dated 11/5/76 and 12/27/76 filed. (ROSEN)
12-30-76	Copy of Bill of Particulars and Motion for the Deft. filed. (ROSE)
12-30-76	Index to Court Exhibits and Court exhibits one (1) through sixteen
	filed.
	Special form of Verdict filed.
	Copy of Indictment filed.
	Stenographer's Transcript dated November 5, 1976 filed. Record on Appeal certified and hand delivered to the Court of Appe
12-30-70	by John L. Pollok. (ROSENBLUM)
	No. 100 and 10
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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

JERRY ROSENBLUM and HENRY MAYORGA,

Defendants.

INDICTMENT

Cr. No. 15 (R.404) (T. 21, U.S.C. 9841(a)(1), 9846; T. 18, U.S.C. 92)

5/6-75

THE GRAND JURY CHARGES:

#### COUNT ONE

On or about and between the 1st day of April 1975 and the 1lth day of April 1975, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants JERRY ROSENBLUM and HENRY MAYORGA, together with Donald Ackerman, William Kwastel and Larry Sussman, herein named as co-conspirators but not as defendants, and others unknown to the grand jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Section 841(a)(1) of Title 21, United States Code.

- 1. It was a part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute cocaine hydrochloride, a Schedule II narcotic drug controlled substance.
- 2. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Section 846)

In furtherance of the conspiracy and to effect the objects thereof, the following overt act, among others, was committed within the Eastern District of New York:

#### OVERT ACT

1. On or about April 3, 1975, the defendants JERRY ROSENBLUM and HENRY MAYORGA met with co-conspirators Donald Ackerman and William Kwastel at the premises located at 85-52 152nd Street, Queens, New York.

#### COUNT TWO

On or about the 3rd day of April 1975, within the Eastern District of New York, the defendants JERRY ROSENBLUM and HENRY MAYORGA did knowingly and intentionally possess with intent to distribute approximately one (1) ounce of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2)

#### COUNT THREE

On or about the 3rd day of April 1975, within the Eastern District of New York, the defendants JERRY ROSENBLUM and HENRY MAYORGA did knowingly and intentionally distribute approximately one (1) ounce of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2)

#### COUNT FOUR

On or about the 4th day of April 1975, within the Eastern District of New York, the defendant JERRY ROSENBLUM did knowingly and intentionally possess with intent to distribute approximately one (1) ounce of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2)

#### COUNT FIVE

On or about the 4th day of April 1975, within the Eastern District of New York, the defendants JERRY ROSENBLUM and HENRY MAYORGA did knowingly and intentionally distribute approximately one (1) ounce of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21,

United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2) COUNT SIX

On or about the 9th day of April 1975, within the Eastern District of New York, the defendant JERRY ROSENBLUM did knowingly and intentionally possess with intent to distribute approximately two (2) ounces of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2)

#### COUNT SEVEN

On or about the 9th day of April 1975, within the Eastern District of New York, the defendant JERRY ROSENBLUM and HENRY MAYORGA did knowingly and intentionally distribute approximately two (2) ounces of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2)

#### COUNT EIGHT

On or about the 11th day of April 1975, within the Eastern District of New York, the defendant JERRY ROSENBLUM did knowingly and intentionally possess with intent to distribute approximately one-quarter ((3)) of a kilogram of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2)

A TRUE BILL.

FOREMAN

UNITED STATES ATTORNEY EASTERN DISTRICT OF NEW YORK

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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

JERRY ROSENBLUM,

Defendant.

INDICTMENT

Cr. No. (T. 21, U.S.C., \$841(a)(1), and \$846; T. 18, U.S.C., \$2)

THE GRAND JURY CHARGES:

#### COUNT ONE

On or about and between the 1st day of April 1975 and the 11th day of April 1975, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant JERRY ROSENBLUM together with Donald Ackerman, William Kwastel and Larry Susaman, herein named as co-conspirators but not as defendants, and others unknown to the grand jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Section 841(a)(1) of Title 21, United States Code.

- 1. It was a part of said conspiracy that the defendant and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute cocaine hydrochloride, a Schedule II narcotic drug controlled substance.
- 2. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Section 846).

In furtherance of the conspiracy and to effect the objects thereof, the following overt act, among others, was committed within the Eastern District of New York:

#### OVERT ACT

1. On or about April 3, 1975, the defendant

JERRY ROSENBLUM met with co-conspirators Donald Ackerman

and William Kwastel at the premises located at 85-52

152nd Street, Queens, New York.

#### COUNT TWO

On or about the 3rd day of April 1975, within the Eastern District of New York, the defendant JERRY ROSENBLUM did knowingly and intentionally possess with intent to distribute approximately one (1) ounce of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Sections 841(a)(1)).

#### COUNT THREE

On or about the 3rd day of April 1975, within the Eastern District of New York, the defendant JERRY ROSENBLUM did knowingly and intentionally distribute approximately one (1) ounce of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1)).

#### COUNT SIX

On or about the 9th day of April 1975, within the Eastern District of New York, the desendant JERRY ROSENBLUM did knowingly and intentionally possess with intent to distribute approximately two (2) ounces of cocaine

- 3 -

hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841 (a)(1).

#### COUNT SEVEN

On or about the 9th day of April 1975, within the Eastern District of New York, the defendant JERRY ROSENBLUM did knowingly and intentionally distribute approximately two (2) ounces of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1)).

A TRUE BILL.

FOREMAN.

DAVID G. TRAGER UNITED STATES ATTORNEY EASTERN DISTRICT OF NEW YORK

12 UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK UNITED STATES OF AMERICA. 75 Cr. 404 (ERN) -V-JERRY ROSENBLUM. NOTICE OF MOTION Defendant. ------SIR: PLEASE TAKE NOTICE that upon the Indictment, the Affidavit of ARTHUR L. MASS, Esq., sworn to the Hong of October, 1976. and all other proceedings heretofore had herein, a motion will be made before the Hon. Edward R. Negher, United States District Court Judge for the Eastern District of New York, at a time and place to be fixed by the Court, for an Order pursuant to Rule 12 of the Federal Rules of Criminal Procedure striking and dismissing Count I of the Indictment against the defendant, Jerry Rosenblum, and further, for Order procluding the Government from presenting at trial any evidence whatsoever concerning counts IV, V, and VIII upon which counts the defendant, Jerry Rosenblum was heretofore acquitted. YOURS, etc., HOFFMAN POLLOK MASS & GAST-HALTER By: Althout mas Attorneys for Defendant Jerry Rosenblum TO: United States Attorney For the Eastern District 477 Madison Avenue New York, New York 19022 of New York 225 Cadman Plaza East (212) 688-7788 Brooklyn, New York and Clark of the Court BEST COPY AVAILABLE

A 13

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA.

v.

AFF IDAVIT

JERRY ROSENBLUM.

Defendant.

ARTHUR L. MASS, being duly sworn, deposes and says:

- I. I am a member of the law firm of Hoffman Polick Mass
  Gasthalter, attorneys for the defendant, JERRY ROSENBLUM (hereinafter
  "Rosenblum") and am familiar with the facts and circumstances set forth
  herein. I make this Affidavit in support of the relief requested in the instant
  Notice of Motion.
- down by a Grand Jury, which charged Rosenblum and one other, Henry Mayorga, with conspiring to violate and violating the narcotics laws of the United States. In December, 1975, Rosenblum and Mayorga were tried in the Eastern District before Judge Neaher and the Jury. At the conclusion of the trial, a Jury acquitted Rosenblum of counts IV, V, and VIII of the Indictment and hung on the remaining counts. Judge Neaher dismissed all counts of the Indictment against Mayorga and further ordered that Rosenblum be re-tried.

3. It is respectfully submitted, that given the principle of Ex Parte Bain 121 U.S. 1 (1887), wherein the Supreme Court enunciated the prohibition against amendment of an indictment other than by the Grand Jury itself, on re-trial, count I of the Indictment should be dismissed against Rosenblum and further, given the Jr y's verdict, the government should be precluded from presenting at the re-trial any evidence whatsoever concerning counts IV, V, and VIII and the evidence of April 4 and April 11, upon which counts Rosenblum was heretofore acquitted.

4. Count I of Indictment # 75 Cr. 404, upon which Rosenblum is to be re-tried, charges inter alia that "on or about and between the 1st day of April, 1975 and the 1lth day of April, 1975, both dates being approximate and inclusive...." Rosenblum conspired to violate the narcotics laws of the United States. As aforestated Rosenblum had been heretofore acquitted of counts IV, V, and VIII, which concerned themselves with respectively, the transactions of April 4 and April 11, 1975. Inasmuch as count I of the Indictment, as it was handed down by the Grand Jury, covers the period of April 1 through and including April 11, Rosenblum could be convicted of the conspiracy upon evidence concerning transactions and dates upon which he had heretofore been acquitted by a Jury. Given the distinct possibility that Rosenblum could be convicted of a conspiracy based upon transactions upon which he had heretofore been acquitted, it is respectfully submitted, that unless the conspiracy count is dismissed as to Rosenblum on re-trial, he

would be placed in violation of his right to be free from double jeopardy as guaranteed by the Fifth Amendment to the Constitution of the Upited States.

5. Under any circumstances, given the Jury's verdict, counts IV, V, and VIII must be in all respects stricken as to Rosenblum and in no circumstances should the government by permitted to offer on re-trial any evidence whatsoever concerning those counts and the alleged transactions of April 4 and April 11, of which Rosenblum was heretofore acquitted by a Jury.

ARTHUR L. MASS

Sworn to before me, this l8th day of October, 1976.

UNITED S	TATES	DISTRI	CTC	OURT
EASTERN	DISTRI	CT OF	NEW	YORK

UNITED STATES OF AMERICA

-against-

75 Cr. 404

JERRY ROSENBLUM,

Defendant.

#### MEMORANDUM OF LAW

HOFFMAN POLLOK MASS & GASTHALTER
Attorneys for Defendant
477 Madison Avenue
New York, New York 10022
(212) 688-7788

Arthur L. Mass (Of Counsel) This memorandum is submitted in opposition to what purports to be a memorandum of law submitted on behalf of the Government.

On page 1, the Government sets the tune by stating in footnote #1

"since the defendant did not articulate his argument or cite any supporting authority, the Government has framed the issues presented. It is submitted, that contrary to the contentions of the Government, the arguments of the defendant in his moving papers have been soundly articulated and that the Government in its memorandum has utterly failed to address the issues presented in the moving papers, but has, instead, presented merely self-serving issues.

In a trial before this Court and a jury in December, 1975, the defendant was acquitted on counts IV, V, and VIII. The jury was hung as to counts I, II, III, VI, and VIII. Counts IV, V, and VIII concern the events of April 4 and April 11.

The indictment, as indicated in the moving papers, as handed down by the Grand Jury, alleges a conspiracy to violate the narcotics laws between and including April 1 through April 11.

It has always been the law that "a jury verdict of acquittal is determinative of a particular issue that was contested at trial."

Hoag v. State of New Jersey, 356 U.S. 464 (1957); Sealfon v. United States, 332 U.S. 575 (1948).

In light of that legal postulate, plainly and simply put, it is our position that inasmuch as a jury, after hearing the evidence and being charged on the law, saw fit to acquit the defendant on counts IV, V, and VIII concerning the events of April 4 and April 11, principles of due process of law, collateral estoppel and res judicata prohibit the Government from introducing evidence as to those activities upon which the defendant has already been acquitted. Ashe v. Swenson, 397 U.S. 436 (1970). Likewise, to re-try the defendant for the incidents of April 4 and April 11, or to permit evidence of those incidents to reach the jury, upon which such a jury may, in fact, convict the defendant of counts I, II, III, VI, and VII, is violative of the defendant's right not to be placed in double jeopardy as guaranteed by the Fifth Amendment to the Constitution of the United States.

The issue raised by the defendant's moving papers at page 3, therefore, is not whether a "re-trial where there had previously been a hung jury is . . . violative of the Fifth Amendment." Clearly, it is axiomatic that the answer to that question is in the negative. Again, however, that is not the issue herein. The issue is whether the constitutional rights of the defendant to be free from double jeopardy and to be guaranteed due process of law would be violated if the Government were to be permitted to re-introduce against the defendant

evidence concerning counts of an indictment upon which he had been heretofore acquitted so as to sustain those counts of the indictment being re-tried as handed down by the Grand Jury prior to the acquittal.

It is respectfully submitted, that a jury's verdict was determinative of the transactions embodied in counts IV, V, and VIII. As such, the Government should not be permitted to again present to the jury evidence of those transactions for the purpose of establishing counts I, II, III, VI, and VII upon which the jury was hung and a mis-trial was declared.

RESPECTFULLY SUBMITTED.

Attorney for Defendant.

#### insberg LRIPM pat

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THE COURT: Bring in the jury.

(Jury entered the jury box.)

THE COURT: Good afternoon members of the jury.

Members of the jury, we are now at the stage of the trial where you are about to undertake your final function as jurors. Your duty is a serious and important one. In performing it, you actively share with the Court the responsibility of administering justice according to law and the evidence in the case. Your oath as jurors obliges you to discharge this final task in an attitude of complete fairness and impartiality. And as was emphasized by me when you were selected as jurors, without bias or prejudice for or against the Government or the defendant, as parties to this controversy.

The case is important to the Government since the enforcement of the criminal laws is of prime importance to the welfare of the community. On the other hand, it is equally important to the defendant who is charged with a serious crime, and has the right to receive a fundamentally fair trial. The community has an interest in that too.

Let me add, the fact that the Government is a

party entitled to no greater consideration than that accorded to any other party to a litigation. By the same token, it is entitled to no less consideration. All parties, Government and individuals alike, stand as equals before the Bar of Justice. Your final role is to decide and pass upon the fact issues in the case. You are the sole and exclusive judges of the facts. You determine the weight of the evidence. You appraise the credibility of the witnesses. You draw the reasonable inferences from the evidence, you resolve such conflicts as there may be in the evidence.

I shall later refer to how you determine the credibility of witnesses.

My final function is to instruct you as to the law; and it is your duty to accept these instructions as to the law and to apply them to the facts as you may find them.

with respect to any fact matter, it is your recollection and yours alone that governs. As I have told you, anything that counsel, either for the Government or the defendant may have said with respect to matters in evidence, whether during the trial, in a question, in argument or information, is not to be substituted for your own recollection of the evidence.

So too, anything the Court may have said during the trial or may refer to during the course of these instructions, as to any matter in evidence, is not to be taken in lieu of your own recollection. Before we consider the precise charges against the defendant on trial, some preliminary matters should be noted.

The indictment names one defendant,

Jerry Rosenblum. Three other individuals, however, are named in count one as co-conspirators, namely,

Donald Ackerman, William Kwastel, and Larry Sussman.

Ackerman and Kwastel have testified before you as witnesses for the Government. In the course of their testimony you have learned that each of them had pled guilty to a separate charge of conspiracy growing out of the acts alleged in the indictment.

I instruct you that those guilty pleas are no proof whatever of the guilt of the defendant on trial and they are not to enter into your consideration in determining whether or not the Government has proved the charges against the defendant here on trial. Guilt is personal. The guilt or innocence of the defendant on trial must be determined solely upon the evidence presented against him or the lack of evidence.

The charges against the defendant stand or fall

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upon the proof or lack of proof against him, and not as against those who were accused with him.

There are certain principles of law which apply in every criminal case and to which I made reference and emphasized at the time of your selection as jurors. I repeat them to you now:

The indictment is merely an accusation, a charge. It is no evidence of proof of a defendant's guilt. You will give no weight whatever to the fact that an indictment was returned which named Jerry Rosenblum as a defendant.

The defendant on trial has pleaded not guilty; thus, the Government has the burden of proving the charges against him beyond a reasonable doubt. A defendant does not have to prove his innocence; on the contrary, he is presumed to be innocent of the accusations contained in the indictment. This presumption of innocence is in the defendant's favor at the start of the trial; continued in his favor throughout the entire trial, is in his favor even as I instruct you now, and remains in his favor during the course of your deliberations in the jury room. It is removed only if and when you are satisfied the Government has sustained its burden of proving the guilt of the

defendant beyond a reasonable doubt.

The question that naturally comes up is what is a reasonable doubt? The words almost define themselves; that there is a doubt founded in reason and arriving out of the evidence in the case or the lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence. Reasonable doubt is a doubt which appeals to your reason, your judgment, your common sense and your experience. It is not caprice, whim, speculation, conjecture or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If, after a fair and impartial consideration of all the evidence, you can cadidly and honestly say you are not satisfied of the guilt of the defendant, that you do not have an abiding conviction of his guilt, in short, if you have such a doubt as would cause you as prudent persons, to hesitate before acting in matters of importance to yourselves, then you have a reasonable doubt, and in that circumstance it is your duty to acquit.

On the other hand, if after such an impartial and fair consideration of all the evidence, you can

candidly and honestly say you do have an abiding conviction of the defendant's guilt, such a conviction as you would be willing to act upon in important and weight matters in the personal affairs of your own life, then you have no reasonable doubt and under such circumstances it is your duty to convict.

One final word on this subject. Reasonable doubt does not mean a positive certainty beyond all possible doubt. If that were the rule, few persons however guilty they might be, would be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible of mathematical certainty.

In consequence, the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

Let us turn to the charges contained in the indictment, which I will again read to you.

Count one charges that on or about and between the first day of April, 1975 and the 11th day of April, 1975, both dates being approximate and inclusive, within the Eastern District of New York and

elsewhere, the defendant, Jerry Rosenblum together with Donald Ackerman, William Kwastel and Larry Sussman, herein named co-conspirators, but not as defendants, and others unknown to grand jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Section 841(a)(1) of Title 21 United States Code.

It was part of said conspiracy that the defendant and co-conspirators did knowingly and intentionally distribute and possess with intent to distribute cocaine hydrochloride, a Schedule II narcotic drug controlled substance.

It was a further part of said conspiracy that the defendant and co-conspirators would conceal the existance of the conspiracy and would take steps designed to prevent disclosure of their activities.

In furtherance of the conspiracy, and to effect the objects thereof, the following overt act, among others, was committed within the Eastern District . New York:

On or about April 3, 1975, the defendant

Jerry Rosemblum met with co-conspirators

Donald Ackerman and William Kwastel at the premises

located at 85-52 152nd Street, Queens, New York.

Count two of the indictment charges that on or about the third day of April, 1975, within the Eastern District of New York, the defendant Jerry Rosenblum did knowingly and intentionally possess, with intent to distribute, approximately one ounce of cocaine hydrochloride, a Schedule II narcotic drug controlled substance.

Now, in the interest of shortening this up, count three charges that on that same date of April 3, 1975 the defendant Rosenblum did knowingly and intentionally distribute the same one ounce of cocaine hydrochloride, each being specified as a separate count because, as I will explain to you shortly, each is a separate crime.

Count six charges that on or about the 9th day of April, 1975, the defendant Jerry Rosenblum did knowingly and intentionally possess with intent to distribute approximately two ounces of cocaine hydrochloride.

Count seven charges that on or about that same day of April 9, 1975, the defendant, Rosenblum, did knowingly and intentionally distribute approximately two ounces of cocaine hydrochloride.

Now, in summary, you will note, first, the

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defendant on trial has been charged in count one with conspiring together with Donald Ackerman,
William Kwastel and Larry Sussman, as co-conspirators,
to possess with intent to distribute and to distribute cocaine hydrochloride, in violation of the Federal law known as the Drug Abuse Prevention and Control
Act.

Count one alleges that this conspiracy took

place during the period between the first and the 11th

days of April, 1975, both dates being approximate

and inclusive, and that it was a further part of the

alleged conspiracy that the defendant and co-conspira
tors would conceal its existence and take steps designed

to prevent disclosure of their activities.

Act was to exercise Federal control in order to prevent traffic in or improper use of drugs having a substantial and detrimental effect on the health and general welfare of the American people. Criminal penalties of fine or imprisonment or both are provided for violations of the CAct. The provisions upon which the charges in this indictment are based read in pertinent part as follows, and I will quote first Section 841(a)(1) as it is called, and I quote:

"It shall be unlawful for any person knowingly or intentionally to distribute or dispense or possess within intent to distribute or dispense a controlled substance."

Section 846 of the same Act provides, and I quote:

"Any person who conspires to commit any offense defined in this subchapter is punishable by imprisonment, or fine, or both."

Before I spell out what the Government must prove in order to establish violations of the foregoing statutes, there are certain terms in those statutes which require explanation. Section 841 requires that the distribution or possession be done knowingly or intentionally. The purpose of the word "knowingly" is to insure that no one shall be convicted for an act done because of mistake or accident or other innocent reason.

An act is done knowingly if done voluntarily and intentionally, that is, deliberately with the bad purpose to disobey or disregard the law. A transaction is not intentional unless it is knowing, so the two words, knowingly or intentionally, may be considered together.

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The words "with intent to distribute" simply mean with the intent that the narcotics or controlled substances are not possessed for one's personal use but are intended to be sold, delivered, transferred, or made available to someone else.

The word "possession" as used in the statute
is understood in law to describe two types of possession,
actual possession or constructive possession.

Actual possession means that a defendant knowingly has personal, manual, or physical control of drugs. Constructive possession means that although the drugs are in the physical possession of the person, a defendant knowingly has the power to exercise control over them or their distribution. That is, to set the price of their sale or to cause their delivery.

Finally, a word about the words "controlled substance" appearing in the statute. These terms are used because the law applies to a broad range of narcotic drugs and substances which have drug-like effects.

The cocaine hydrochloride referred to in the indictment, commonly known as cocaine, is a narcotic drug controlled substance covered by Section 841.

Turning now to count one which alleges that the defendant on trial conspired with the co-conspirators

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Charge of the Court

Ackerman, Kwastel, and Sussman, during the period from on or about April 1st to April 11th, 1975, I will now explain what is meant by the term "conspiracy."

A conspiracy to commit a crime is an entirely separate and distinct offense from the substantive crime or crimes which are the object of a conspiracy.

A conspiracy is simply a combination, agreement or understanding of at least two persons to accomplish, by concerted action, a criminal or unlawful.

In this case the substantive crimes, are possession and distribution of cocaine which are alleged in counts two, three, six, and seven, of the indictment.

A conspiracy is often referred to as a partnership in crime in which each partner acts and speaks
for the others in the furtherance of the partnership
business. Even if he were not present.

Bear in mind, however, that mere association of a defendant with an alleged conspirator does not establish his participation in a conspiracy nor is knowledge without participation sufficient.

In order to convict the defendant on trial on count one, the Government must prove beyond a reasonable

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doubt the following essential elements:

One, the existence of the conspiracy charged in the indictment;

Two, that the defendant on trial knowingly associated himself with the conspiracy;

Three, that one of the conspirators knowingly committed at least one of the acts set forth in the indictment or one of the acts of distribution or possession of cocaine set forth in counts two, three, six, and seven, at or about the time alleged.

In other words, what the evidence must show in order to establish the first element -- that a conspiracy existed -- is that the members in some way or manner impliedly or tacitly came to a common understanding to violate the law or to accomplish an unlawful plan.

Explicit language or words are not required to indicate assent or attachment to a conspiracy.

In determining whether there has been an unlawful agreement, you may judge acts and conduct of the co-conspirators which are done to carry out an apparent criminal purpose. These include conversations and discussions among them to that end.

Usually, the only evidence available is that of

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disconnected acts and conduct on the part of the alleged individual conspirators which acts and conduct when taken in connection with each other and taken as a whole, permit an inference that a conspiracy did in fact exist.

In short, acts and conduct are to be viewed not in isolation but in conjunction with each other and in connection with all the evidence.

You must determine if the Government's proof has established the existence of the conspiracy as charged in count one.

In deciding the first element you consider all the evidence admitted with respect to the conduct, acts and declarations of each alleged co-conspirator, and that includes Ackerman, Kwastel, and Sussman, even though they are not on trial, and such inferences as may be reasonably drawn therefrom.

It is sufficient to establish the existence of the conspiracy if from the proof of all the relevant facts and circumstances, you find beyond a reasonable doubt that the minds of at least two alleged conspirators met in an understanding way to accomplish, by the means alleged, one or more objects of the conspiracy, as charged in the indictment.

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approximately during the time period alleged, the next thing you must determine is whether the defendant here on trial was a memeber of the conspiracy. That is the second element the Government must prove beyond a reasonable doubt.

A defendant's participation in a conspiracy, if you find one did exist, must be established by the independent evidence of his own acts, statements and conduct as well as those of the other alleged co-conspirators, and the reasonable inferences to be drawn therefrom.

Mere association of a defendant with an alleged conspirator or conspirators does not establish his participation in a conspiracy if you find one did exist. Nor is knowledge of the illegal acts of others sufficient.

Thus, the mere existence of an association or a friendship between a defendant and an alleged co-conspirator by itself would not be sufficient to establish the defendant's participation in the conspiracy.

Likewise, if one acts in a way which furthers the conspiracy but has no knowledge of it, he does not

thereby become a participant.

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In short, to find a defendant guilty of conspiracy you must find beyond a reasonable doubt that,
aware of its purpose, he was a willing participant
with the intent to advance its purpose. If you do
so find then, however limited his role in furthering
the objectives of the conspiracy, he is responsible
for all that was done in furtherance thereof during
its continuance and it does not matter whether his part
was a majorrole or minor role.

Once you are satisfied beyond a reasonable doubt that a conspiracy existed, and that a defendant on trial was a member, then the acts and declarations of any other person you also find to be a member — that is a co-conspirator not named as a defendant — made by such co-conspirators during the existence of the conspiracy and the furtherance of its objectives are considered the acts and declarations of the defendant so found to be a member even though he was not present.

Summing it up in a simple way, if in fact there was a partnership in crime, each partner acts and speaks for the others in the furtherance of the partnership business even if the others were not present.

A further word of caution. I repeat, mere association of a defendant with an alleged conspirator or alleged conspirators does not establish his participation in a conspiracy, if you find one did exist, nor is knowledge without participation sufficient.

Thus, even if you find that the defendant
Ronsenblum, for example, had associated with Ackerman
and others, and you further find that the latter were
participants in a conspiracy to sell cocaine to the
undercover agent, and Rosenblum knew they were engaged
in such activity, this by itself would not be sufficient
to find him guilty on the conspiracy charge.

You must find some conduct by a defendant of an affirmative character either of speech or of action are on his part occurring act or after the time of his alleged association with the conspiracy and during its existence, which satisfies you beyond a reasonable doubt that what he did or said was knowingly done in furtherance of some objective or purpose of the conspiracy as charged.

A conspiracy once formed is presumed to continue until its object or purpose has been accomplished.

The Government here charges that the conspiracy existed and continued from on or about and between the

## Charge of the Court

first and 11th days of April, 1975. The Government is not bound by the exact dates alleged in the indictment.

It is sufficient if the evidence satisfies you beyond a reasonable doubt that the conspiracy existed during some part of the period alleged.

Now, I have already mentioned that the third essential element of the crime of conspiracy is that an overt act intended to affect the object of the conspiracy must be committed by at least one of the co-conspirators after the unlawful agreement has been made.

An overt act is any step, action, or conduct which is taken to achieve, accomplish, or further the objective of the conspiracy.

The purpose of requiring proof of an overt act is that while parties might conspire and agree to violate the law, yet they may change their minds, and do nothing to carry it into effect in which event it will not constitute an offense.

The overt act need not be a criminal act nor the very crime which is the object of the conspiracy.

So much for count one. Now I will turn to the substantive counts which charge the defendant on trial with having possessed cocaine with intent to distribute.

Those counts are counts two and six which allege that he did sell on two dates, April 3 and April 9, 1975.

Before the defendant may be convicted on any possession count, the Government must establish beyond a reasonable doubt each of the following essential elements:

One, that on or about the date mentioned in the particular count the defendant did possess with intent to distribute, the quantity of cocaine specified;

Two, that he did so knowingly or intentionally;

Three, that the narcotic controlled substance
was in fact cocaine hydrochloride.

I have already explained what is made by

"knowingly and intentionally," "possession," and

"intent to distribute." As I have said, Federal Law

makes it a crime merely to possess a narcotic controlled

substance if a person does so with the intent to pass

it along to someone else, that is, with intent to distribute it.

The actual distribution of a narcotic controlled substance, such as cocaine, is a separate and distinct crime. In counts three and seven, the defendant is also charged with distributing quantities of cocaine

hydrochloride, in violation of the Federal Drug Act, and he is alleged to have done this on the same dates, namely, April 3 and 9, 1975.

Before he may be convicted of anyone of those distribution counts, the Government must establish beyond a reasonable doubt each of the following three essential elements:

One, that on or about the date mentioned in a particular count the defendant distributed a narcotic controlled substance;

Two, that the defendant actied knowingly or intentionally;

Three, that the narcotic controlled substance was in fact cocaine hydrochloride.

I might add that while I have told you that the Government is required to prove each and every element of the crimes charged, beyond a reasonable doubt, each piece of evidence need not be proved beyond a reasonable doubt; it is in the application of the facts to the totality of the circumstances which must prove the charges in the indictment beyond a reasonable doubt.

Moreover, the Government is under no duty to negate all possible innocent inferences from a set of circumstantial facts.

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In considering the evidence bearing upon the possession and distribution counts, there is another Federal Law which may be applicable and which you should keep in mind.

Where two or more persons are charged with the commission of a substantive crime -- and as I have said possession and distribution are each a substantive crime -- a word which is used to distinguish that type of offense from the crime of conspiracy -- the guilt of a defendant may be established without proof that he personally did every act constituting the offense charged. This is so because under Section 2 of Title 18 of the United States Code, every person who wilfully participates in the commission of a crime may be found to be guilty of that offense and I am going to read Section 2 to you, quoting it:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Under this statute, it is not even necessary
that the aider or abettor be present at the actual
commission of the offense. I caution you however,
that mere presence and guilty knowledge on the part of
a person would not suffice to make him an aider and

abettor.

You must be convinced beyond a reasonable doubt that he was knowingly doing something to assist in accomplishing the crime.

abetted the commission of an offense you must ask yourself these questions: Did he associate himself with
the venture? Did he participate in it as something
he wished to bring about? Did he seek, by his actions,
to make it succeed? If he did, then he is an aider
and abettor.

Accordingly, you may find the defendant

Rosenblum guilty of the offense of knowingly and intentionally possessing cocaine with intent to distribute it only if you find beyond a reasonable doubt that the defendants Ackerman and Kwastel committed the offense and that the defendant Rosenblum knowingly aided and abetted them.

With the foregoing instructions in mind, let us turn to the evidence bearing on the charges in the indictment.

By evidence, I mean of course, all the testimony you have heard except that which I have instructed you to disregard whether the evidence was brought out on

direct examination or cross-examination; all the exhibits admitted into evidence regardless of who introduced them, and all the stipulations of fact.

Now, I do not think it necessary to remind you of those which I believe were read to you yesterday.

There was a stipulation with regard to what a laboratory expert of the Drug Enforcement Administration would say if he came here to testify about the contents of the white powder in Government's Exhibits numbered 1, 4, 5, and 10.

Incidentally, what I have said with respect to that stipulation is not to be taken as any indication that the defendant admits any knowledge or participation in respect of such cocaine. On the contrary, he flatly denies it.

Even though there is no dispute about the nature of those exhibits, your function as judges of the facts require you to find beyon a reasonable doubt that the substances referred to in the 4 exhibits in question is in fact cocaine hydrochloride.

If you so find, then I instruct you as a matter of law, that would fulfill the requirement of a narcotic controlled substance as specified in the drug act.

I also remind you that there was a further stipulation that the defendant, Jerry Rosenblum, was never mentioned on the recorded tapes of telephone conversations between special agent Levine and the witness Kwastel.

There was another stipulation with respect to the defendant's attendance at York College and the location of the administrative office and its change of location in August of 1971 and another stipulation with respect to the testimony of a former Police Department Laboratory employee with regard to finger-print matters.

If you should require any of those to be read to you at any time that can be done. We have the transcript here.

Since counsel for the Government and the defendants have each reviewed in detail the evidence and emphasized their respective contentions, any comments I may make here or have made, will refer to it only in rather broad terms, and are intended solely to assist you in focusing on the issues of fact you have to decide.

First, let me say there are two kinds of evidence: Direct and circumstantial.

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Direct evidence is where a witness testifies to what he saw, observed, and heard, and what he knows of his own knowledge, that which comes to him by virtue of his senses.

Circumstantial evidence is where facts are established from which in terms of common experience, one may logically infer other facts that are sought to be established.

A common example I frequently give is this: There are no windows in this courtroom so you cannot see out doors. Perhaps when you were last outdoors, it was a relatively clear and dry day and the sun was shining and so forth. But, you are in here now and suppose someone walks through that door and you see he has got water dripping from his clothes. Immediately you might infer, of course, that the weather had changed to rain. But, a cautious juror might say, well, he could have passed next to a sprinkler or someone might have tossed some water off the roof. However, if he walks through the door with a dripping umbrella in his hand, you are left with only one inference -- it must have been raining outside. That is what we mean by drawing an inference from one fact as to the existence of another fact.

Circumstantial evidence, if believed, is of no lesser value than direct evidence for in either case you must be convinced beyond a reasonable doubt of the guilt of the defendant.

In this case the Government relies upon both direct and circumstantial evidence. It contends, through the testimony of the undercover agent, Michael Levine, and the defendants, Ackerman, and Kwastel that it has offered certain direct proof regarding the transactions referred to in the indictment, both in respect to the conspiracy and the substantive counts of possession and distribution referred to in counts two, three, six, and seven.

Now, the defendant contends on the other hand, that the evidence is deficient in respect of his active participation in any of those transactions, and in particular, he assails the testimony of the witnesses Ackerman and Kwastel as particularly unbelieveable.

Whether the defendant knowingly and intentionally participated with the co-conspirators, Ackerman, Kwastel, and Sussman, in the substantive offenses alleged or with them in the claimed conspiracy, presents issues of fact and questions of credibility.

Clearly, this concerns what is in a man's mind.

Charge of the Court

Medical science has not yet devised an instrument whereby we can go back to the time of the occurrence of the events and determine what then was a

person's intent or knowledge. These may only be
determined from a person's acts, his conduct and surrounding circumstances and such inferences as may
reasonably be drawn therefrom.

Conduct of a defendant, including statements

made upon being informed that a crime has been commit
ted, or upon being confronted with a criminal charge,

also may be considered by the jury in the light of

other evidence in the case in determing the guilt or

innocence of the accused.

When a defendant voluntarily offers an explanation or makes some statement intending to establish his innocence, or to exculpate him of the crime charged and such explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to consciousness of guilt.

I remind you, according to the testimony of special agent O'Connor, when he arrested the defendant and remarked that he was going to take him over to join his friends, the defendant is said to have denied having any friends there or knowing what his arrest was

## Charge of the Court

all about and that he had done nothing to be arrested for.

The Government claims this was a false statement, a fabrication, deliberately made by Rosenblum. If you do so find, you may consider this as evidence of consciousness of guilt.

However, you must find beyond a reasonable doubt that the statements, if you do find they were made, were false and were made voluntarily and after the defendant had been advised of his constitutional rights.

Whether or not evidence as to a defendant's voluntary statements points to consciousness of guilt and the significance, if any, to be attached to any such evidence, is entirely for your determination.

Now, I have not adverted to all the evidence upon which the Government and the defendants rely to support their respective contentions. All evidence whether or not referred to by me or by counsel in summation is important and must be considered by you.

In anything I have said about testimony, I have sought to state the substance thereof with accuracy.

However, if any reference to testimony that I have made does not agree with your recollection -- and I have stated this before -- you are to disregard such

reference by me -- and I emphasize this as strongly as I can -- always, it is your recollection and yours alone that governs and you must unhesitatingly reject any statement I have made with regard to a fact which does not accord with your own recollection.

It must be apparent to you that the versions of the Government and defense are in sharp divergence on key points and critical issues of fact and credibility are raised. You are called on to decide the fact issues here. How do you decide this? Well, now I think you understand why at the start of the trial I suggested it would be desirable and important for you to not only listen but to look at the witnesses as they testified.

Your determination of the issue of credibility very largely must depend upon the impression that a witness made upon you as to whether or not he was telling the truth or giving you an accurate version of what occurred.

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I often say to jurors, when you wak into the courtroom and sit in the jury box while the trial is going on and later on when you are deliberating in the jury room, you have your common sense, your good judgment and your experience with you.

You decide whether or not a witness was straightforward and truthful; whether he attempted to conceal anything; whether he had a motive to testify falsely; whether there is any reason he might color his testimony.

In other words, what you try to do, to use the vernacular, is to size a person up as you would do, as I said before, in any important matter where you were undertaking to determine whether or not a person was truthful, candid and straightforward.

In passing upon the credibility of a witness, you may also take into account inconsistencies or contradictions as to material matters in his own testimony or any conflict with that of another witness.

A witness, however, may be inscurate, contradictory or even untruthful in some respects and yet be entirely credible in the essentials of his testimony.

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The ultimate question for you to decide in passing upon credibility is, did the witness tell the
truth here before you as to essential matters.

In the case of the witnesses Ackerman and Kwastel there are additional facts you must take into consideration. Ackerman and Kwastel are self-confessed criminals, informants and accomplices in the commission of the crimes with which the defendant on trial is charged.

An accomplice is one who wilfully associates himself with the commission of a crime. The law does not prohibit the use of accomplices and whether you approve or disapprove of their use is not to enter into your consideration of this case.

In certain types of crime, the Government of necessity is frequently compelled to rely on the testimony of self-confessed criminals, informants or accomplices. Otherwise, it would be difficult to detect or prosecute some wrongdoers and this is true most usually where conspiracy is charged.

The Government often has no choice in the matter. It must take witnesses to the transactions as they are.

There is no requirement that the testimony of

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a self-confessed criminal or accomplice be corroborated by other evidence. A conviction may rest on the uncorroborated testimony of such witnesses if it is found credible and reliable.

The testimony of these witnesses may be accepted or rejected in whole or in part as you see fit. However, the testimony of such witnesses should be viewed with great caution and scrutinized with care and you should consider their criminal participation carefully as bearing on their credibility.

Nevertheless, it does not follow that because a person has acknowledged participation in a crime or is an accomplice that he is not capable of giving a truthful version of what occurred.

You should ask yourselves these questions: Did Ackerman or Kwastel color their testimony contrary to fact because they had been offered some sort of deal by the Government or because they hoped that they will benefit in some way at the time they are sentenced or did both of them make a clean breast of their wrongdoing and tell the truth as to significant matters?

If you find their testimony was deliberately untruthful you should unhesitatingly reject it and

if so, you must acquit the defendant.

not accept it.

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On the other hand, if upon a cautious and careful examination you are satisfied that they have given a truthful version of essential events beyond a reasonable doubt there is no reason why you should

The Government witness Ackerman: I have to point out has admitted lying under oath in the past. I charge you that you should consider his testimony most carefully and decide whether you wish to accept or reject it in whole or in part. You may decide for example, that an admitted liar is unbelieveable. Conversely, you may accept his testimony recognizing that in life there are persons who have lied in the past but are not incapable of telling the truth in the present. Again, this is for you and only you to decide.

The fact that some Government witnesses were Government agents does not entitle their testimony to any greater weight or consideration than that afforded to any other witness in the case. You will evaluate their credibility the same way you do that of any other witness.

If you find that any witness -- and this applies

alike to Government and defense -- willfully testified falsely as to any material matter of fact, you have a right to reject the testimony of that witness in its entirety, or you may accept that part or portion which commends itself to your belief as credible.

The defendant Rosenblum has not testified in this case. That is his absolute right, and in no respect may be considered by you as any evidence against him or as a basis for any presumption or inference unfavorable to him. You must not permit that fact to weigh in the slightest degree against him, nor should it enter into your deliberations or discussion.

The guilt or innocence of the defendant on trial before you is for you and you alone to determine.

During the course of the trial the attorneys at various times have objected to certain questions and have taken other procedural positions before you. These are matters of technical procedure that are the proper concern of the attorneys and should not concern you in any way.

I instruct you that you are not to draw any inferences from the fact that attornyes made objections and motions here during the trial.

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The Government to prevail in this case must prove the essential elements of each of the three types of offenses: Conspiracy, possession, distribution, by the required degree of proof as I have already explained in these instructions. If it succeeds as to any count, your verdict should be guilty. If it fails, it should be not guilty.

However, to find the defendant guilty of conspiracy, you must find that the defendant was engaged in the conspiracy with at least one other person not on trial; that is, a co-conspirator, since as I have told you, a conspiracy requires an agreement or understanding between at least two persons. A person cannot conspire with himself.

The verdict as to each count in the indictment must be unanimous. Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendant solely upon the basis of such evidence and these instructions.

Under your oath as jurors, as I mentioned previously, you cannot allow a consideration of the sentence which may be imposed upon a defendant, if he is convicted, to enter into your deliberations or to influence your verdict in any way.

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Your duty is to decide the case solely and only upon the evidence. In the event of a conviction, the duty to impose sentence rests solely with the Court.

Each juror during deliberation is entitled to his or her own opinion. Each of you, however, should exchange views with your fellow jurors. That is the very purpose of jury deliberation, to discuss and to consider the evidence, to listen to the arguments of fellow jurors, to present your individual views, to consult with one another, and to reach an agreement based solely and wholly on the evidence, if you can do so, without violence to your own individual judgment. Each one must decide the case for himself or herself after consideration with his or her fellow jurors. But you should not hesitate to change an opinion, which after discussion with your fellow jurors, appears erroneous. However, if after carefully considering all the evidence and the arguments of your fellow jurors you entertain a conscientious view that is different from others, you are not to yield your judgment simply because you are outnumbered or outweighed.

Your final vote must reflect your conscientious view as to how the issues should be decided.

Charge of the Court

The charges here, as I have said, are serious.

The just determination of this case is important to the public. It is equally important to the defendant.

Under your oath as jurors, you must decide the case without fear or favor and solely, as I have stated any number of times, in accordance with the evidence and the law.

If the Government has failed to carry the burdent as to the defendant, your sworn duty is to acquit.

If it has carried its burden, you must not flinch from your sworn duty, you must convict.

I am going to recess you for a short while in order to give counsel an opportunity to inform me whether I have misspoken or omitted anything from these instructions which I ought to have said.

Before I do that, however, I now come to the task of separating the two alternate jurors from the 12 jurors who are alone permitted to deliberate in the case, and I am going to permit the two of you to go into the jury room and recover anythings you may have there and send you off with my sincere thanks and appreciation for your patient and careful attention.

You may do that.

(Alternates excused.)

Now members of the jury, one more word. My practice here is to send you into the jury room with a form of special verdict which covers each of the possible verdicts you could reach as to each count. That will enable you to focus on the various counts in the indictment.

you will also be provided with a pencil and paper so as to facilitate any communication you may wish to make to the Court. The ordinary practice is for Juror Number One to be your foreperson and to transmit the messages to the martial who will be guarding your jury room door and then the message will be relayed to me and I will convene counsel to discuss the response that should be made.

There are exhibits available. And of course in this case there is also a fully prepared transcript of everything that has been said here.

It would be my suggestion that when you retire to deliberate you ask for a particular exhibit, or, if you must, a particular portion of testimony to be read in order to resolve some particular question that has come up. In other words, it is not a good idea to take exhibits in wholesale, or to ask for the entire testimony of some witness to be read back. It is much

better to begin your discussion. You all, I am sure, have formed views about the case. You want to let each other know about them. And in the course of the discussion that I hope will follow, and which should certainly follow, some question may come up, and at that time it is necessary to read a portion of testimony, or to examine a particular exhibit, Juror Number One will write it on a note and send it in. And we will deal with it as promptly as possible so you have the answer.

I will send you out for a few minutes. I am sure your confreres have departed. And I will speak to counsel and let you know when you may start your deliberations.

(The jury thereupon retired from the courtroom)

THE COURT: All right, Mr. Mass.

MR. MASS: With due respect, sir, first I should state for the record that after Mr. Goldman gave his summation and he mentioned the envelopes, the three envelopes from York College, I would -- I should have at that point taken exception to it. After he spoke I failed to do so. I feel now I should put it on the record and make request of your Honor to grant

My argument basically would be, your Honor, that he was inferring that Mr. Rosenblum possessed narcotics on the fourth and on the 11th.

THE COURT: All right, I will deny that.

MR. MASS: As far as your Honor's charge goes,
I would take exception to your Honor's wording and
reasoning as to why the Narcotic Act was passed.

THE COURT: All right. You may have an exception to that.

MR. MASS: Thank you, sir.

I would most respectfully except to the length of time your Honor spent on the first two -- actually the first and third part of the elements of the conspiracy. We as the defense offered no -- well, we did not state or take the position that the conspiracy between Ackerman and Kwastel didn't exist to pass the narcotics.

THE COURT: Well, you did not want me to charge that the defense conceded that, did you?

MR. MASS: Well, I just felt -- it was just the amount of time that your Honor spent on it.

THE COURT: I thought I gave them equal time.

MR. MASS: Well, the first and third part -- the overt act -- it was just the amount of time and the

terminology used. It was the middle part which is what we contend Mr. Rosenblum was not a part of the conspiracy.

THE COURT: I thought I told them that at length.

MR. MASS: Your Honor did spend time on it. I thank you for that. But I just felt that it was equally weighted with the first and third. And the heart of the defense was in effect we conceded the first, and the fact that the conspiracy between Ackerman and Kwastel existed.

There was some terminology, and I wasn't able

to write this down quickly enough, so I don't really

quite know -- that is why I am trying to stand up

here now and quote it -- well, your Honor was charging

the jury as to the Government not having to negate

innocent acts -- and I am sorry my exception is vague

at this point, sir, but --

THE COURT: Well, that was the additional charge that the Government submitted. I think you received a copy of it, didn't you?

MR. MASS: Yes, I did.

THE COURT: And I indicated I would give that charge, as I recall, at the time I indicated that I would give all the supplemental charges that you

submitted except one, which was the fourth and the letter.

MR. MASS: It was "D", sir.

THE COURT: All right. Anything else?

MR. MASS: Yes very briefly, sir, I would take exception when your Honor was referring to all the exhibits that got into evidence, I think the record is clear that I objected -- as best I could -- to the narcotic transactions as to the fourth and 11th.

Your Honor made rulings. When your Honor referred to all the exhibits submitted into evidence, obviously that includes the York College envelopes of the fourth and the 11th.

THE COURT: All right. We had colloquy on that.

MR. MASS: We did. I just think that -- maybe

it's my neurosis -- but that was during the charge and

I felt I just should take an exception to it.

Likewise an exception would apply I think, your Honor, by myself to the part of your charge where your Honor indicated the stipulation that Mr. Goldman and I agreed to about the laboratory expert testing all four drugs that were admitted into evidence, all four packets of drugs I should say, and that obviously would include the drugs of the fourth and the 11th. Therefore I think the exception I am taking would apply

along those lines.

THE COURT: All right. Anything else?

MR. MASS: Yes. I would just take exception to the way your Honor -- and I do this most respectfully, sir -- to the way your Honor marshaled the evidence concerning the testimony of Agent O'Connor. And just towards the end, your Honor, when your Honor instructed the jury that "3. A person cannot conspire with himself," that that terminology, in the order in which it came, is why I take exception to that.

And the last one, your Honor, would be your Honor suggestion to the jury that the jury not ask for the entire testimony of the witness to be read, or all the exhibits -- that they ask for all the exhibits.

That would be the extent of my exceptions.

THE COURT: Mr. Goldman?

MR. GOLDMAN: Your Honor, the only remark I have is what I brought up before regarding the charge with regard to Mr. Ackerman's admission that he had lied on prior occasions. Now I thought that was taken out of context, but that has been noted all ready.

THE COURT: Are the marshals here?

THE MARSHAL: Yes.

THE COURT: Step up please.

(The marshals were thereupon sworn by the Clerk of the Court at 3:05 o'clock P.M.) THE COURT: You may tell them that they may deliberate (addressing marshal). Now what about the special verdict form? THE CLERK: It is in there. (Indicating) THE COURT: Have you got a copy? THE CLERK: Yes. THE COURT: I think there is enough to go around. (Continued next page)

United States District Court 101 M'BILMED United States of America vs. Eastern Dist. of NY M. MITMED DEFENDANT 75 CR 404 JERRY ROSENBLUM JUDGMENT AND PROBATION/COMMITMENT ORDER 40 245 (974) In the presence of the attorney for the government the defendant appeared in person on this date -12 L\_\_\_ WITHOUT COUNSEL Mowever the court advised defendant of right to court and asked schools determined desired to COUNSEL WITH COUNSEL LATTHUE L. Mass, Esq. - (Num of counsel) ☐ GUILTY, and the court being satisfied that ☐ ☐ NOLO CONTENDERE, ☐ NOT GUILTY PLEA there is a factual basis for the plea-L\_\_\_\_ NOT GUILTY. Defendant is also harped There being a finding/verdict of LX GUILTY in count one Defendant has been convicted as charged of the offense(s) of violating T-21, U.S. Code

Sec. 846, in that on or about and between April 11 and April 11, FINDING & 1975, both dates being approximate and include, the defendant, with others, did combine, conspire, confederate and agree to knowingly & intentionally distribute and possess with intent to distribute cocaine hydrochloride, a Schedule II narcotic drug controlled substance and would take steps designed to prevent " JUDGMENT ٠. disclosure of their activities The court esked whether defendant had anything to say why jurgment vious not be pronounced. Decayar on sufficient cause to the constant of was shown, or appeared to the court, the court equiliged the detendent guilty as charged and converted and surfaced that The defundant is hereby committed to the custody of the Attorney General or his authorized representative for improvement for a period of 4 years imprisonment to run concurrently with the unexpired Special Parole Term previously impesed by Judge Rayfiel, plus a Special Parole Term of 6 years. Execution of sentence stayed pending appeal. On motion of Assistant United States Attorney, Peter Goldman, counts 2,3,6, and 7 are dismissed. SENTENCE OR PROBATION ORDER FILED SPECIAL CONDITIONS OF DEC 1 7 1976 3 PROBATION TIME AM ... ADDITIONAL In addition to the special conditions of probation represent above, it is hereby carried that the general conditions of probation set aut on the reverse side of this judgment be imposed. The Court may charge the conditions of probation, including the probation period or which is a resemble probation period of the years parameter by the court may name as a set and reverse probation for a whilston occurring during the probation period. CONDITIONS OF PROBATION The court orders commitment to the custody of the Attorney General and recommissible It is englossed that the Clark deliver a contidued copy of this sudgment and committee of to the U.S. Mar-COMMITMENT RECOMMEN soul or other qualified office DATION SIGNED BY Edward R. Weaher J U.S. District Aliago